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NEW DELHI

याचिका संख्या./ Petition No. 190/MP/2022

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 15th of January, 2024

IN THE MATTER OF:

Petition under Sections 79(1)(a) and 79(1)(f) of the Electricity Act, 2003 read with Clause 10.2.2 of the Power Purchase Agreement dated 31.03.2016.

AND IN THE MATTER OF:

NTPC Green Energy Limited,
NTPC Bhawan,
Core – 7, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi – 110003

...Petitioners

Versus

1. Rajasthan Urja Vikas Nigam Limited,
Through its Managing Director,
Vidyut Bhawan,
Janpath, Jyoti Nagar,
Jaipur-302 005 (Raj)

2. Jaipur Vidyut Vitaran Nigam Limited,
Through its Managing Director,
Vidyut Bhawan,
Janpath, Jaipur – 302 005

3. Ajmer Vidyut Vitaran Nigam Limited,

Through its Managing Director,
Hathi Bhata,
Jaipur Road, Ajmer – 305 001

4. Jodhpur Vidyut Vitaran Nigam Limited,

Through its Managing Director,
New Power House,
Industrial Area, Jodhpur – 342 003

...Respondents

Parties Present: Ms. Shikha Ohri, Advocate, NGEL
Ms. Mary Jonet, Advocate, NGEL
Shri Ukarsh Singh, Advocate, RUVNL
Ms. Kritika Khanna, Advocate, RUVNL

आदेश/ ORDER

The Petitioner, NTPC Green Energy Limited (NGEL), is a generating company and has developed a 260 MW solar PV power project at Bhadla-II, District Jodhpur, Rajasthan (Project). The present petition was originally filed by NTPC Limited. The Petitioner, during the hearing held on 02.05.2023, submitted that NTPC's 260 MW Solar PV Power Project at Bhadla-II, to which the present case relates, has now been transferred to its wholly owned subsidiary, NTPC Green Energy Limited (NGEL) and the Petitioner accordingly filed the necessary amended memo of parties on 03.05.2023, which was taken on record by the Commission. NGEL is seeking a declaration that the notification of the *RERC Forecasting, Scheduling, Deviation Settlement and Related Matters of Solar and Wind Generation Sources Regulations, 2017 (RERC F&S DSM Regulations, 2017)* dated 14.09.2017, constitutes a change in law, in terms of the Power Purchase Agreement dated 31.03.2016 and compensation thereof.

2. Respondent No.1, i.e. Rajasthan Urja Vikas Nigam Limited (RUVNL), is a company incorporated under the Companies Act, 2003 and has been established to carry out power trading business for the distribution licensees within the state of Rajasthan.
3. Respondents No. 2 to 4 are distribution licensees operating in the state of Rajasthan.

4. The Petitioner has made the following prayer:
- a. *Declare that the notification of the RERC Forecasting, Scheduling, Deviation Settlement and Related Matters of Solar and Wind Generation Sources Regulations, 2017 constitutes a change in law, in terms of the Power Purchase Agreement dated 31/03/2016;*
 - b. *Direct the Respondents to reimburse the scheduling and forecasting charges, as paid by the Petitioner to the QCA;*
 - c. *Pass such other order(s) as the Commission may deem just in the facts of the present case.*

Submission of the Petitioner

5. Briefly, the Petitioner has submitted as under:
- a) On 31.03.2016, the Petitioner executed a Power Purchase Agreement (PPA) with the Jaipur, Ajmer and Jodhpur DISCOMS (i.e. JVVNL, AVVNL and JdVVNL for the purchase of the entire power generated from the project at a levelized tariff of Rs. 5 per kWh.
 - b) As per clause 4.1.2 of the PPA, all charges/fees related to scheduling and dispatch of electricity shall be borne by the Discoms of Rajasthan. The relevant clause stipulates as under:

4.1 SCHEDULING
4.1.1. ...
4.1.2. All charges/fees related to scheduling and dispatch of electricity shall be borne by JVVNL, AVVNL and JdVVNL.
 - c) On 14.09.2017, the *RERC F&S DSM Regulations, 2017* were notified, and the same came into force on 01.02.2018. Clause 4 of the aforesaid regulations stipulates that a Qualified Coordinating Agency (QCA) shall be appointed as the coordinating agency on behalf of wind/solar generators connecting to a pooling station. The relevant extract is as under:

ROLE OF QUALIFIED COORDINATING AGENCY (QCA):
4. The Qualified Coordinating Agency (QCA) as defined at Regulation 2(1)(o) DSM Regulations shall be nominated based on consensus and mutually agreed terms and conditions amongst the wind and solar generators. The wind and solar generators shall also inform SLDC to this effect. QCA shall be the single point of contact with SLDC on behalf of its coordinated generator(s) connected to a pooling station for the following purposes:
(1) Provide schedules with periodic revisions as per these Regulations on behalf of all the Wind/Solar Generators connected to the polling station.....

- d) Under Regulation 13 of the *RERC F&S DSM Regulations, 2017*, SLDC issued “*The Procedure for implementation of the framework on Forecasting and Scheduling for Renewable Energy (RE) Generating Stations (Wind and Solar) dated 28.12.2017*” (F&S DSM Procedures, 2017).
- e) Clause 20 of the *F&S DSM Procedures, 2017*, stipulates as under:
SLDC fee and other charges including scheduling and operating charges shall be payable by QCA or RE generator, as the case may be.
- f) Therefore, the enactment/ promulgation of the *RERC F&S DSM Regulations, 2017* and *F&S DSM Procedures, 2017* issued amounts to a Change in Law in terms of the PPA.
- g) In terms of the Procedure, QCA is to be treated as an intra-state entity. To cater to the statutory requirement of scheduling through QCA, NTPC has engaged M/s. RE Energy Solutions Private Ltd., Bengaluru, an agency already registered with SLDC, as QCA for forecasting and scheduling services of Bhadla Solar PV Station as per *RERC F&S DSM Regulations, 2017* from 01.10.2018.
- h) On 06.02.2020, the Petitioner raised invoices for Rs. 5.40 lacs, Rs. 8.01 lacs and Rs. 6.48 lacs to Ajmer, Jaipur and Jodhpur DISCOMS, respectively, towards reimbursement of scheduling and forecasting charges, as paid by the Petitioner to the QCA up to December 2019. However, in a letter dated 13.02.2020, the said Discoms stated that the scheduling and forecasting charges paid to the QCA by the Petitioner are not payable by them.
- i) Through various correspondences, the Petitioner has been persuading RUVNL that the scheduling and forecasting charges paid by NTPC to the QCA are in accordance with the applicable regulatory provisions and, thus, are payable by the Rajasthan DISCOMS as per clause 4.1.2 of the PPA dated 31.03.2016. Further, as per clause 20 of the Procedure, the SLDC fee and other charges are payable by the QCA or the RE generator. Accordingly, the QCA has been charging fees for scheduling and forecasting since 01.02.2018.
- j) However, the Respondents, through various correspondences, have been contesting the payment and have been stating that M/s. RE Connect Energy Solution Pvt. Ltd. had been appointed by NTPC for forecasting and scheduling services for the project subsequent to the signing of the PPA. Further, the responsibility of forecasting lies

with the SPD, and expenditure made by the SPD on this account is not payable by the DISCOMS.

- k) *RERC F&S DSM Regulations, 2017* were notified by RERC on 14.09.2017, after the execution of the PPA dated 31.03.2016, and thus, in terms of Clause 10 of the PPA, the notification of the *RERC F&S DSM Regulations, 2017*, which mandates the appointment of QCA, constitutes a change in law and the relief for the same, is subject to the approval of this Commission.
- l) The Petitioner has also placed reliance on the Appellate Tribunal for Electricity (APTEL) judgment dated 14.08.2022 in the case of *Adani Power Rajasthan Ltd. vs. RERC & Ors. (Appeal Nos. 119 and 277 of 2016)* wherein it was held as follows:

“11. ...

A. *Issues raised by APRL:*

...

*xvi. From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. **The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed for basic freight rate only. Accordingly, any such change by Indian Governmental Instrumentality herein Indian Railways has to be necessarily considered under Change in Law event and need to be passed on to APRL.** In terms of the PPA, such changes in the surcharges and levy of new Port Congestion Surcharge which do not exist at the time of cut-off date falls under 1st bullet of Article 10.1.1 of the PPA read with the definitions of the ‘Law’ and ‘Indian Government Instrumentality’ under the PPA. According these issues are answered in favour of APRL/Appellant.”*

- m) The Petitioner could not have envisaged the change in law regarding the scheduling charges and charges payable to the QCA at the time of signing the PPA. Further, the PPA clearly provides that any additional liability on account of tax/levies will be to the account of JVVNL, AVVNL and JdVVNL. Thus, the charges paid to the QCA for forecasting and scheduling ought to be reimbursed by JVVNL, AVVNL and JdVVNL to the Petitioner.
- n) Before the applicability of the *RERC F&S DSM Regulations, 2017*, there was no cost applicable to the generator for servicing its obligation for forecasting and scheduling charges under the PPA, and after the promulgation of the *RERC F&S DSM Regulations, 2017*, an extra cost/charge was assigned to the generator, which was not considered in the tariff agreed upon. The Petitioner has submitted that the impact of

the change in law on the Petitioner till May 2022 is Rs. 43.69 lacs in the head of forecasting and scheduling charges.

- o) The essence of the provision of change in law is to reconstitute the generator from the increase in cost due to promulgations of the laws having cost implications in servicing the obligations assigned under the agreement, and that no distinction is to be made in the “Change in Law” provisions based on the function assigned.

Collective Submission of the Respondent No. 1 to 4

6. Briefly, Respondents No. 1 to 4 have submitted that the present Petition is not maintainable before this Commission on the following grounds:
 - a) The present issue neither involves the determination of tariff nor does it require adjudication upon terms and conditions of tariff, namely the tariff parameters;
 - b) The *RERC F&S DSM Regulations, 2017*, which form the crux of the issue, has been notified by the State Commission and not this Commission;
 - c) The Petitioner is connected to the State Transmission Utility in the State of Rajasthan; and
 - d) The generating station of the Petitioner is situated in the State of Rajasthan, supplying its entire power to the distribution companies in the State of Rajasthan;
 - e) This Commission’s jurisdiction under section 79 (1) (a) of the Electricity Act, 2003 can be invoked in cases involving the question of “tariff” of the central government-owned companies only and that the present issue has nothing to do with determination of tariff.
 - f) The Tribunal, in various decisions while magnifying the scope of section 79 (1)(a) of the Act, has clarified that while the term “regulate” is not only limited to a determination of tariff, it can be expanded to include terms and conditions affecting tariff which means tariff parameters. However, the present dispute neither involves the determination of tariff nor does it require this Commission to adjudicate on tariff parameters.
 - g) The facts involved in the present Petition also fail to pass the muster of a “Composite Scheme” as laid down by the Hon’ble Supreme Court in *Energy Watchdog v. Central Electricity Regulatory Commission [2017 (14) SCC 80] [Paras 24 to 29]* as the generating station admittedly is situated in the State of Rajasthan, the entire power generated from the generating station is admittedly being consumed within the State of Rajasthan, and the generating station is connected to the network of the State transmission utility.

- h) Even Clauses 10.2.1 and 10.2.2 of the PPA do not render the present Petition maintainable since it is a well-settled law that contracts cannot confer jurisdiction.
- i) The forecasting and scheduling in any event is to be undertaken by the Petitioner. Thus, there has been no change in the factual position with respect to forecasting and scheduling of power.
- j) It cannot be the case of the Petitioner that prior to the coming into force of the *RERC F&S DSM Regulations, 2017*, it was not scheduling and forecasting the power as supplied.
- k) From a perusal of the provisions of the *RERC F&S DSM Regulations, 2017*, it is clear that forecasting and scheduling through the QCA is optional.
- l) *RERC F&S DSM Regulations, 2017*, mandate that only in cases where there are multiple generators connected to a pooling station does the need arise for opting for the services of a QCA. No details have been provided by the Petitioner regarding the number of generators connected to the pooling station in question. Also, the QCA charges, if payable, would have to be apportioned between the various generators connected at the pooling station. The Petition is curiously silent on all these salient aspects.
- m) From a perusal of the invoices annexed to the present Petition, it can be seen that the Petitioner has even failed to disclose the details of the forecasting charges. This is without prejudice to the position that forecasting charges are, in any event, not payable under the PPA.

Rejoinder by the Petitioner

- 7. Vide Rejoinder dated 23.08.2023, the Petitioner has reiterated its submissions made in the plaint. As such, the same are not reproduced here for the sake of brevity. Additionally, the Petitioner has submitted as under:
 - a) The special jurisdiction granted to this Commission with regard to the regulation of tariffs of the central generating companies under Section 79 (1) (a) of the Act and the adjudication of disputes in respect to the same under section 79 (1) (f) of the Act, prevails over the general powers of the State Commission to adjudicate upon disputes between the generating companies and the distribution companies as provided under Section 79 (1) (a) of the Act.

- b) Reliance has been placed on the decision of the Hon'ble Supreme Court in the case of *J.K. Cotton Spg & Wvg Milia Co. Ltd. v. State of Uttar Pradesh, AIR 1961 SC 117*, wherein the Hon'ble Supreme Court has held as below:

*“In cases of conflict between special provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision. The rule that general provisions should yield to specific provision is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large numbers of matters in general and another to only some of them, his intention is that these latter directions should prevail as regards these, while as regards all the rests, the earlier decisions should have affect. In *Pretty V. Solly (1859) 53 ER 1032*: quoted in *Craies on Statute Law (6th Edition)* at p. 206 Romilly, M.R, mentioned the rule thus: 8 “The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to effect the other parts of the statute to which it may properly applies.”*

- c) This Commission, in its order dated 01.03.2023, in the matter of *NTPC Renewable Energy Limited v. Gujarat Urja Vikas Nigam Ltd. in Petition No. 279/MP/2022 & 284/MP/2022*, has held that NTPC Renewable Energy Limited is a wholly-owned subsidiary of a central generating company (NTPC Ltd) and therefore, adjudication involving such a wholly-owned subsidiary shall be governed by this Commission alone.
- d) The present dispute is nothing but a tariff dispute because the relief sought by the Petitioner has a direct bearing on the Petitioner's tariff . Any new law which has a bearing on the cost of generation of electricity is nothing but an issue of tariff, and the dispute arising out of this issue of the regulation of the tariff of a central generating station falls within the exclusive jurisdiction of this Commission.
- e) Article 10 of the PPA provides for relief to the Petitioner due to a change in law event as extracted hereinbelow:

“10. CHANGE IN LAW 10.1 DEFINITIONS The following terms shall have the following meanings:

10.1.1 “Change in Law” means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/non recurring expenditure by the Station or any income to the Station:

- The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation), of any Law, including rules and regulations framed pursuant to such Law;*

...

10.2 RELIEF FOR CHANGE IN LAW 10.2.1 The Parties shall be required to approach the CERC for seeking approval of Change in Law. 10.2.2 The decision of the CERC to acknowledge a Change in Law and provide relief for the same shall be final and governing on both the Parties.”

- f) The contention of the Respondent that the present case is not a case of regulation of tariff is bald and misplaced. The Respondents have failed to define if the cost incurred by the Petitioner towards scheduling and dispatch under the *RERC F&S DSM Regulations, 2017* is not to be reimbursed as “tariff”, then under which category such costs shall fall on account of Change in Law events.
- g) This Commission has the requisite authority to interpret the regulations of the State Commissions i.e. *RERC F&S DSM Regulations, 2017* in this case. Further, as long as any such regulation has an impact on the tariff or its parameters, the jurisdiction of this Commission by virtue of Section 79 (1) (a) and (f) is absolute. Reliance placed on the case of *Lexicon Vanijya Pvt. Ltd. & Anr. V. NTPC Vidyut Vyapar Nigam Ltd. & Ors. (Petition No. 296/MP/2019)*, wherein there was a composite scheme of generation and supply of power, and this Commission interpreted the Rajasthan *RERC F&S DSM Regulations, 2017* and allowed relief to the Petitioners therein.
- h) The invoices raised by the Petitioner on the Respondent contained complete details of the scheduling and forecasting charges paid by the Petitioner to the QCA contrary to the claim of the Respondents that the invoices do not provide details of the scheduling and forecasting charges paid by the Petitioner.
- i) The *RERC F&S DSM Regulations, 2017* have to be read with the relevant provisions of the Detailed Procedure (Procedure for implementation of the framework on forecasting and scheduling for renewable energy (RE) generating stations (wind and solar), which makes it evident that the appointment of QCA is not optional for the generators. Further, as provided in the *F&S DSM Procedures, 2017*, in case there is more than one generator at a pooling substation, the appointment of a QCA is not optional, and the QCA is to be appointed by the majority of the generators. Thus, it is incorrect to state that such a decision was an internal decision because the Petitioner appointed the QCA only under the *RERC F&S DSM Regulations, 2017*, read with the *F&S DSM Procedures, 2017*.
- j) The contention of the Respondents that the Petitioner was always performing such functions in the past is incorrect. It is correct that on a pooling station with multiple generators, a QCA is appointed, and otherwise the sole generator acts as a QCA.

However, it is of no significance whether the work is done through the generator as QCA or an independent company appointed as a QCA because, in both cases, costs will be incurred towards the performance of functions under the *RERC F&S DSM Regulations, 2017* read with the *F&S DSM Procedures, 2017*, which additional costs ought to be passed through.

- k) The 260 MW Bhadla solar PV project was developed in 680 MW Phase-II of Bhadla Solar Park, having a total of 10 solar projects that are connected to 2 (two) pooling stations. Accordingly, 5 projects at one pooling station have appointed one QCA for each project, and another 5 projects at another pooling station have appointed a QCA for each project as agreed by a majority of the projects. As on date, for NGEL, at one pooling point wherein 130 MW is connected, 'RECONNECT ENERGY SOLUTIONS LIMITED' is acting as QCA and at another pooling point wherein balance 130 MW is connected, 'KREATE TECHNOLOGIES PRIVATE LIMITED' is acting as QCA.
- l) The Petitioner has duly placed on record various documents substantiating that the Respondent Discom is well aware of the transactions under which the present petition is filed. Reference is made to the letter dated 13.05.2020 sent from RUVNL to the Petitioner wherein RUVNL has stated as below:

“With reference to above cited subject, it is intimated that you have appointed M/s RE Connect Energy solution Pvt. Ltd. as QCA for Forecasting and Scheduling Services of Bhadla Solar Plant, subsequent to signing of PPA. Further Forecasting is the responsibility of SPD and any expenditure made by the SPD on this account is not payable by Discom.”

- m) Thus, the Respondent Discoms are cognizant of the transaction between the QCA and the Petitioner. In fact, the Respondent Discoms never contested the sums or the validity of the transactions between the QCA and the Petitioner and has only stated that the same is not payable by it.
- n) The Petitioner wrote multiple letters to the Respondent Discoms detailing the cause of action, the promulgation of the DSM Regulations as a Change in Law event, and further providing the Respondent Discoms with appropriate invoices. At no stage during the entire process did the Respondent Discoms make any attempt to seek any further information, including the terms agreed between the parties.

Analysis and Decision

8. We have heard the learned counsels for the Petitioner and the Respondent and have carefully perused the records.

9. On the basis of the submission of the parties, the issues that arise for adjudication are:

Issue No. I: *Whether this Commission has the jurisdiction under section 79 (1)(a) and (f) of the Electricity Act, 2003 to adjudicate upon the present disputes between the Petitioner being the wholly owned subsidiary of NTPC Limited (which is owned by the Central Government) and the distribution licensees of Rajasthan?*

Issue No. II: *Whether the engagement of QCA by the Petitioner is a change in law event?*

Issue No. III: *Whether the Respondents should be directed to reimburse the scheduling and forecasting charges, as paid by the Petitioner to the QCA?*

10. Now, we proceed to discuss the above issues.

Issue No. I: *Whether this Commission has the jurisdiction under section 79 (1)(a) and (f) of the Electricity Act, 2003 to adjudicate upon the present disputes between the Petitioner being the wholly owned subsidiary of NTPC Limited (which is owned by the central government) and the distribution licensee of Rajasthan?*

11. The Petitioner has stated that NGEL is a Government Company owned by the central government. Therefore, in terms of Section 79(1) (a) and (f), this Commission has the requisite jurisdiction to adjudicate the present petition. *Per Contra*, the Respondents have submitted that merely because NTPC is a government company does not mean that this Commission has the jurisdiction to decide the disputes, especially when the issue does not pertain to tariff determination or inter-state transmission but adjudication on tariff parameters.

12. We observe that the Petitioner has developed a 260 MW Bhadla solar PV project in 680 MW Phase-II of Bhadla Solar Park, having a total of ten (10) solar projects that are connected to two (2) pooling stations, viz. GSS-I & GSS-II. Further, five (5) projects at one pooling station have appointed one QCA for each project, and another five (5) projects at another pooling station have appointed a QCA for each project as agreed by a majority of the projects. As on date, for NGEL, 130 MW is connected at one pooling point where *M/s Reconnect Energy*

Solutions Limited is acting as QCA and at another pooling point where a balance of 130 MW is connected, *M/s Kreate Technologies Private Limited* is acting as QCA.

13. We observe that section 79(1) of the Electricity Act, 2003 (the Act, 2003) stipulates as under:

Section 79. (Functions of Central Commission): --- (1) *The Central Commission shall discharge the following functions, namely:-*

- (a) to regulate the tariff of generating companies owned or controlled by the Central Government;**
- (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*
- (c) to regulate the inter-State transmission of electricity;*
- (d) to determine tariff for inter-State transmission of electricity;*
- (e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;*
- (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;**
- (g) to levy fees for the purposes of this Act;*
- (h) to specify Grid Code having regard to Grid Standards;*
- (i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;*
- (j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;*
- (k) to discharge such other functions as may be assigned under this Act.*

14. We observe that while explaining the scope of the term “regulate” under Section 79(1)(a) of the Act, the Appellate Tribunal, in its judgment dated 10.12.2009 in Appeal No. 161/2009 (*DVC v. BRPL and Ors.*) has held as under:

*“18. It cannot be debated that Section 79(1)(a) deals with the generating companies to regulate the tariff. The term “regulate” as contained in Section 79(1)(a) is a broader term as compared to the term “determine” as used in Section 86(1)(a). In various authorities, **the Supreme Court, while discussing the term “regulation” has held that as part of regulation, the appropriate Commission can adjudicate upon disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement and the same will encompass the fixation of rates at which the generating company has to supply power to the Discoms.** This aspect has been discussed in detail in the Judgments of the Supreme Court in 1989 Supp (2) II SCC 52 *Jiyajirao Cotton Mills vs. M.P. Electricity Board*, D.K.Trivedi & Sons vs. State of Gujarat, 1986 Supp SCC 20 and *V.S.Rice & Oil Mills vs. State of A.P.*, AIR 1964 SC 1781, and also in *Tata Power Ltd. Vs. Reliance Energy Ltd.* 2009 Vol.7, SCALE 513.”*

15. In this context, the Appellate Tribunal, in its judgment dated 4.9.2012 in Appeal No. 94 and 95 of 2012 (*BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission and Ors.*) has also held as under:

“32. Sections 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff. Determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. For example, interest on working capital which is a component of tariff will depend on the time allowed for billing and payment of bills. This will also have an impact on terms and conditions for rebate and late payment surcharge. Similarly, billing and payment of capacity charge will depend on the availability of power station. Therefore, the scheduling has to be specified in the terms and conditions of tariff.

33. Accordingly, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement etc. are nothing but terms and conditions of supply.

34. Section 79(1)(f) of the Electricity Act, 2003 provides for adjudication of disputes involving a generating company or a transmission licensee in matters connected with clauses (a) to (d) of Section 79. Thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79(1)(f) of the Act.”

16. We also observe that the Hon’ble Supreme Court judgement in the matter of *A.B.C Laminart Pvt. Ltd. & Anr. vs. A.P. Agencies*, (1989) 2 SCC 163 has held as under:

“...where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy.”

17. We also observe that the Hon’ble Supreme Court judgement in the matter of *New Moga Transport Co. vs. United India Insurance Co. Ltd. & Ors.* (2004) 4 SCC 677 has held as under:

“By a long series of decisions it has been held that where two Courts or more have under the CPC jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in any one of such Courts is not contrary to public policy and in no way contravenes Section 28 of the Indian Contract Act, 1872. Therefore, if on the facts of a given case more than one Court has jurisdiction, parties by their consent may limit the jurisdiction to one of the two Courts. But by an agreement parties cannot confer jurisdiction to a Court which otherwise does not have jurisdiction to deal with a matter.”

18. From the above, we find that section 79(1)(a), read with section 79(1)(f), has a wider scope and is not merely confined to the determination of tariffs. It would also involve the adjudication of disputes involving the implementation, application, or interpretation of the provisions of the PPA and the terms and conditions of supply in cases involving the central government-owned generating companies.
19. In the instant petition, we note that the Petitioner, NGEL, is a wholly-owned subsidiary of NTPC Limited. The dispute is regarding reimbursement of the scheduling and forecasting charges as paid by the Petitioner to the QCA because of the engagement of QCA by the Petitioner. We are of the view that the impugned dispute involves the implementation, application, and interpretation of the PPA as well as the terms and conditions of supply of power, and is clearly covered under the ambit of “regulate” in terms of section 79(1) of the Act. Accordingly, we hold that the matter is covered within the jurisdiction of the Central Commission as per Section 79(1)(a) read with Section 79(1)(f) of the Electricity Act, 2003. Further, we observe that merely because the PPA mentions adjudication of the dispute in a specific manner, it cannot oust the jurisdiction of this Commission, which flows from the provisions of the Electricity Act, 2003. Accordingly, we hold that adjudication involving the Petitioner being a central generating company will be governed by this Commission under Section 79 (1)(f) read with Section 79(1)(a) of the Act.
20. The issue is decided accordingly.

Issue No. II: Whether the engagement of QCA by the Petitioner is a change in law event?

21. We note that Regulation 5 of the *RERC F&S DSM Regulations, 2017* provides as under:
- 5. Each pooling station shall have one QCA. However, in case a particular solar or wind generator alone is connected to a pooling station, then such generator shall act as a QCA.*
22. We note that Regulation 13 of the *RERC F&S DSM Regulations, 2017* mandates the SLDC to prepare a detailed procedure, with the approval of the Rajasthan Electricity Regulatory Commission (RERC), for the plan for data telemetry, communication requirement, formats of forecast submission and other details. The relevant Regulation is as under:

13. The plan for data telemetry, communication requirement, formats of forecast submission and other details in this regard shall be provided in the Detailed Procedure prepared by SLDC and approved by the Commission.

23. In accordance with Regulation 13 of the RERC F&S DSM Regulations, 2017, detailed procedures (F&S DSM Procedures, 2017) were prepared by the SLDC after obtaining approval from the RERC. Clause 5 of the F&S DSM Procedures, 2017 deals with the QCA and has been reproduced below:

5. The Qualified Coordinating Agency (QCA):

.....
 (2) QCA shall be the single point of contact with SLDC on behalf of its coordinated generator(s) connected to a pooling station for the following purposes:

- (a) Provide schedules with periodic revisions as per the Regulations on behalf of all the Wind/Solar Generators connected to the pooling station.
- (b) Responsible for coordination with STU/SLDC and other agencies for metering, data collection and its transmission and communication.
- (c) Undertake commercial settlements on behalf of the generators, of such charges pertaining to generation deviations only including payments to the State pool account through the SLDC.
- (d) Undertake de-pooling of payments received on behalf of the generators from the State Pool account and settling them with the individual generators in accordance with these Regulations.
- (e) Undertake commercial settlement of any other charges on behalf of the generators as the case may be mandated from time to time.
- (f) All other ancillary and incidental matters.

QCA shall be treated as an intra-state entity for the purpose of the RERC FS DSM Regulations for Solar and Wind GS 2017.

(3) Each pooling station shall have one QCA. However, in case a particular solar or wind generator alone is connected to a pooling station (Transmission licensee GSS), then such generator shall act as a QCA.

24. From the above, we note that Regulation 5 of the RERC F&S DSM Regulations, 2017 and Clause 5 (3) of the F&S DSM Procedures, 2017 stipulate that nomination of QCA for each pooling station is a must and QCA will be treated as an intra-state entity. Further, in the case where a particular solar or wind generator alone is connected to a pooling station, such generator itself shall act as a QCA.

25. We note that the Petitioner is connected to two GSS as detailed below:

S. No.	Name of the GSS	Name of the generation plants	Capacity (in MW)
1	RSDCL GSS1	Rising Sun Energy	70
		Vector Green	70
		Rising Sun Energy	70

		NTPC Green Energy Ltd	65
		NTPC Green Energy Ltd	65
2	RSDCL GSS2	Secura	70
		Fortum	70
		Secura	70
		NTPC Green Energy Ltd	65
		NTPC Green Energy Ltd	65

26. From the above, we observe that in the instant case, as there is more than one generator connected at the pooling station, the Petitioner is governed as per Regulation 5 of the *RERC F&S DSM Regulations, 2017* and clause 5 (3) of the *F&S DSM Procedures, 2017* to nominate a QCA based on consensus and mutually agreed terms and conditions amongst the wind and the solar generators.

27. We note that Regulation 7 of the *RERC F&S DSM Regulations, 2017* indicates that the forecasting has to be done by the wind and solar generators connected to the state grid or by the QCA on their behalf as stated below:

7. Forecasting shall be done by wind and solar generators connected to the State Grid or by QCAs on their behalf. The SLDC shall also undertake forecasting of wind and solar power that is expected to be injected into the State grid. The forecast by the SLDC shall be with the objective of ensuring secure grid operation by planning for the requisite balancing resources. The forecast by the QCA or wind and solar generator, as the case may be, shall be generator centric. The QCA or wind and solar generators will have the option of accepting the SLDC's forecast for preparing its schedule or providing a schedule to the SLDC based on their own forecast. The QCA shall coordinate the aggregation of schedules of all generators connected to a pooling station and communicate it to the SLDC.

28. From the discussions in the preceding paragraphs, we note that as per Regulation 5, Regulation 7 of the *RERC F&S DSM Regulations, 2017* and Clause 5 of the *F&S DSM Procedures, 2017*, the Petitioner was mandated to engage a QCA at the pooling station level. Further, the pooling station to which the Petitioner is connected has more than one generator; hence, the QCA was required to be nominated under the *RERC F&S DSM Regulations* for carrying out forecasting on behalf of the generating stations connected to the pooling station. Thus, it cannot be claimed by the Respondents that the nomination of QCA was an internal decision of the Petitioner. Rather it is clear that the nomination of QCA by the Petitioner was a regulatory mandate assigned to it under the *RERC F&S DSM Regulations, 2017* and the *F&S DSM Procedures, 2017*, for implementation of the framework

on forecasting and scheduling for renewable energy (RE) generating stations (wind and solar).

29. We observe that QCA is mandated to, *inter-alia*, perform the following functions: (i) to provide schedules to the SLDC on behalf of all the wind/solar generators connected to the pooling station; (ii) coordinate with STU/SLDC and other agencies for metering, data collection and its transmission and communication; (iii) undertake commercial settlements on behalf of the generators, of such charges pertaining to generation deviations only including payments to the State pool account through the SLDC; (iv) undertake de-pooling of payments received on behalf of the generators from the State Pool account and settling them with the individual generators in accordance with these Regulations; (v) undertake commercial settlement of any other charges on behalf of the generators as the case may be mandated from time to time, etc. We agree with the contention of the Petitioner that forecasting by the QCA attracts cost.

30. We also note that Article 10 of the PPA provides for relief to the Petitioner due to a change in law event as extracted hereinbelow:

“10. CHANGE IN LAW

10.1 DEFINITIONS: The following terms shall have the following meanings:

10.1.1 “Change in Law” means the occurrence of any of the following events after the Effective Date resulting into any additional recurring/non recurring expenditure by the Station or any income to the Station:

- The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation), of any Law, including rules and regulations framed pursuant to such Law;*

...

10.2 RELIEF FOR CHANGE IN LAW

10.2.1 The Parties shall be required to approach the CERC for seeking approval of Change in Law.

10.2.2 The decision of the CERC to acknowledge a Change in Law and provide relief for the same shall be final and governing on both the Parties.”

31. From the above, we observe that as per Article 10 of the PPA, ‘Change in Law’ encapsulates the events after the Effective Date, such as the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation), of any law, including rules and regulations framed pursuant to such law, after the effective date of the PPA resulting into any additional recurring/non-recurring expenditure. In the instant petition, we note that the PPA was executed on 31.03.2016 for the purchase of the power

generated from the projects of the Petitioner connected at a levelized tariff of Rs. 5 per kWh. We also note that the *RERC F&S DSM Regulations, 2017*, being in the nature of subordinate legislation, were notified by RERC on 14.09.2017 and came into effect on 01.01.2018 and the *F&S DSM Procedures, 2017*, made in pursuance of the said *RERC F&S DSM Regulations, 2017* were notified on 28.12.2017 much after the signing of the PPA. Hence, the Commission holds that the impugned notification *RERC F&S DSM Regulations, 2017* and the *F&S DSM Procedures, 2017* are covered as ‘Change in Law’ under Article 10 of the PPA.

32. The issue is decided accordingly.

Issue No. III: Whether the Respondents should be directed to reimburse the scheduling and forecasting charges, as paid by the Petitioner to the QCA?

33. In view of our findings in Issue No. II, we hold that the Petitioner is entitled to reimbursement of the scheduling and forecasting charges as paid by the Petitioner to the QCA. Accordingly, we direct that the Respondents shall reimburse the said charges to the Petitioner after due verification of the payments made by the Petitioner to the QCA.

34. Accordingly, Petition No. 190/MP/2022 is disposed of in terms of the above.

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